MOTION FILED
SEP 1 2 2005

(20) (18)

Nos. 04-805 & 04-814

IN THE

Supreme Court of the United States

TEXACO, INC., *Petitioner,*

v.

FOUAD N. DAGHER, et al., *Respondents.*

SHELL OIL COMPANY, *Petitioner,*

v.

FOUAD N. DAGHER, et al., *Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

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SEPTEMBER 2005

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MOTION OF THE AMERICAN PETROLEUM INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Petroleum Institute ("API") hereby seeks leave, pursuant to this Court's Rule 37.3, to file the attached brief as an amicus curiae in support of Petitioners Texaco, Inc. and Shell Oil Company. Petitioners have consented to the filing of this brief, but Respondents have declined to grant their consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

API, a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry. API's more than 400 members cover all

facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question concerning the legal standard for evaluating joint ventures under the antitrust laws. Joint ventures play a significant role in the oil and natural gas industry, and many of API's members are participants in joint ventures. API's members therefore have a strong interest in the antitrust standards that apply to joint ventures, including the scope of per se illegality under the antitrust laws, so that they are not deterred from participating in legitimate, procompetitive joint ventures.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the antitrust laws. API has participated as an *amicus curiae* in other antitrust cases in this Court, including *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (scheduled for oral argument on Oct. 31, 2005), *State Oil Co. v. Khan*, 522 U.S. 3 (1997), and *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented and its significance. Accordingly, API respectfully seeks the Court's leave to file the attached brief supporting Petitioners.

Respectfully submitted.

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September 2005

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QUESTION PRESENTED

Whether it is per se illegal under Section 1 of the Sherman Act for participants in a lawful, economically integrated joint venture to enter into an agreement concerning the prices to be charged for products produced and sold by the joint venture.

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INTEREST OF AMICUS CURIAE

The American Petroleum Institute ("API"), a non-profit District of Columbia corporation, is a national trade association for the U.S. oil and natural gas industry.[1] API's more than 400 members cover all facets of the industry, including exploration, production, transportation, refining, and marketing.

This case presents an important question concerning the legal standard for evaluating joint ventures under the antitrust laws. Joint ventures play a significant role in the oil and natural gas industry, and many of API's members are participants in joint ventures. API's members therefore have a strong interest in the antitrust standards that apply to joint ventures, including the scope of per se illegality under the antitrust laws, so that they are not deterred from participating in legitimate, procompetitive joint ventures.

API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues involving interpretation of the antitrust laws. API has participated as an *amicus curiae* in other antitrust cases in this Court, including *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (scheduled for oral argument on Oct. 31, 2005), *State Oil Co. v. Khan*, 522 U.S. 3 (1997), and *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). API believes that its participation as *amicus curiae* in this case will offer the Court an industry-wide perspective on the question presented and its significance.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for API states that no counsel for a party authored this brief in whole or in part, and that no person other than API, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT

1. In 1998, Petitioners Texaco, Inc. and Shell Oil Co. formed two joint ventures for the purpose of refining, transporting, and marketing gasoline in the United States. One joint venture, Motiva, was formed by Petitioners and a third partner to operate Petitioners' combined downstream assets in the eastern United States.[2] Petitioners formed a second joint venture, Equilon, to operate their downstream assets in the western United States. Only the Equilon joint venture remains at issue before this Court.[3]

Petitioners contributed all of their downstream assets in the United States to the new entities, including "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees." Pet. App. 4a n.3. Petitioners agreed to divide Equilon's profits or losses according to a fixed ratio (56 per cent to Shell, 44 per cent to Texaco), based on the value of the assets that each partner contributed to the joint venture.

Petitioners also granted Equilon an exclusive license to sell gasoline under the Shell and Texaco brand names in the western United States. Petitioners decided that Equilon would maintain both the Texaco and Shell brands

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[2] "Downstream" operations include refining and marketing gasoline and other petroleum products. Shell Pet. App. 2a n.1. (hereinafter "Pet. App."). "Upstream" operations include exploration for and production of crude oil and natural gas. *Id.*

[3] The district court entered summary judgment in favor of Petitioners on all Respondents' claims involving Motiva, on the ground that Respondents never purchased any products from Motiva. Pet. App. 62a-74a. The court of appeals affirmed that ruling, and it has not been challenged in this Court. *Id.* at 9a-11a.

rather than sell gasoline under a single brand. It was further decided that Shell-branded and Texaco-branded gasoline would be sold at the "same price in the same market areas," Pet. App. 5a, and that Equilon would determine the price.[4]

Petitioners continued to compete with each other in a variety of areas that are outside the scope of the joint venture, including upstream operations, foreign operations, chemicals, aviation fuels, and marine fuels. Pet. App. 47a. The joint venture agreement was subject to termination at any time by mutual consent of the parties, or by either party after five years (subject to two years' notice). Pet. App. 4a.[5]

The Federal Trade Commission and the attorneys general of California, Hawaii, Oregon, and Washington conducted an extensive investigation of the proposed Equilon joint venture. At the close of the investigation, the FTC and Petitioners entered into a consent decree that required divestiture of certain assets but did not restrict Equilon's pricing decisions. *See In re Shell Oil Co.*, 125 F.T.C. 769, 778-811 (1998).

2. Respondents, a class of approximately 23,000 operators of Shell and Texaco service stations in the western United States, filed this action in 1999 alleging that Shell and Texaco entered into a per se unlawful agreement to fix prices under Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondents expressly "disclaimed

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[4] The court of appeals stated that this decision was made "either immediately before the formation of the joint ventures or sometime shortly thereafter." Pet. App. 4a-5a.

[5] In 2002 Shell acquired Texaco's interest in Equilon, in accordance with conditions that the FTC imposed on the combination of Texaco and Chevron. *See In the Matter of Chevron Corporation*, FTC Docket No. C-4023 (Decision and Order entered January 4, 2002).

any reliance on the traditional 'rule of reason' test." Pet. App. 6a.

The district court entered summary judgment for Petitioners. The court found that Equilon was an economically integrated joint venture formed to realize efficiencies and cost savings estimated to be worth hundreds of millions of dollars annually. Pet. App. 41a-42a. In rejecting Respondents' per se argument, the district court observed that "every . . . joint venture must, at some point, set prices for the products they sell." *Id.* at 43a. The court concluded that Respondents' per se approach would amount to "a per se rule against joint ventures between companies that produce competing products." Pet. App. 45a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-35a. The majority acknowledged that "there is a voluminous record documenting the economic justifications for creating the joint ventures," including Petitioners' determination "that numerous synergies and cost efficiencies would result" from the joint ventures, yielding "up to $800 million in cost savings annually." Pet. App. 3a. The court of appeals also recognized that the joint ventures "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." Pet. App. 4a. The majority nevertheless concluded that the agreement to establish a unified price for the joint venture's products should be deemed a "naked" restraint of trade, and held to be a per se violation of Section 1 of the Sherman Act, absent a showing that it was "reasonably necessary to further the legitimate aims of the joint venture." *Id.* at 28a. The majority held that Petitioners had failed to make such a showing. *Id.*

The court rejected Petitioners' explanation that the unified pricing provision was intended to avoid potential actions for price discrimination under the Robinson-

Patman Act, 15 U.S.C. § 13, on the ground that the Robinson-Patman Act is "unquestionably . . . inapplicable." Pet. App. 26a. The court of appeals also rejected Petitioners' argument that application of a per se rule would prevent joint ventures from setting prices for their products. The court concluded that the per se rule should apply unless the parties to the joint venture can "demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture." *Id.* at 28a. Although the majority viewed the record in this case as "close" to supporting summary judgment for Respondents, it decided to remand for a determination of whether the "price fixing scheme was ancillary rather than naked." *Id.* at 24a n.16, 28a.

Judge Fernandez dissented. He observed that it is Equilon, rather than Petitioners, that competes in the business of refining, transporting, and marketing gasoline in the western United States. *Id.* at 31a-32a. In his view, "nothing more radical is afoot than the fact that an entity . . . prices its own products." Pet. App. 34a.

SUMMARY OF ARGUMENT

1. The per se rule does not apply to decisions with respect to the pricing of products produced and sold by an integrated, efficiency-enhancing joint venture. This Court has recognized that, as a general matter, joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 768 (1984). Indeed, when parties who would otherwise be competitors "pool their capital and share the risks of loss as well as the opportunities for profit," the resulting entity is "regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982).

Equilon was an integrated production and marketing joint venture. When Petitioners formed Equilon, they ceased competing with each other in the production and marketing of gasoline in the western United States. Petitioners pooled their productive assets to create a single new entity, sharing the risks of loss and the opportunities for profit. In these circumstances, there is no basis for applying the per se rule of illegality to decisions with respect to the pricing of Equilon's products. This Court has recognized that "[w]hen two partners set the price of their goods or services, they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 9 (1979). The antitrust analysis does not change because the joint venture produced and sold products under two brand names rather than one, or because it charged the same prices, rather than different prices, for the two brands. The dispositive point is that Equilon was an integrated joint venture that eliminated competition between Petitioners in the production and marketing of gasoline in the western United States.

2. The court of appeals' decision reflects unwarranted judicial hostility towards joint ventures that will harm competition in the oil and gas industry and elsewhere. The consequences of civil liability under the Sherman Act, including treble damages and attorney's fees, are severe. If private plaintiffs can challenge joint ventures under a per se theory, without even attempting to show that the joint venture actually harms competition, firms will be much less willing to participate in joint ventures. Antitrust law should not prefer one form of business organization over another absent a good reason to believe that the disfavored structure is likely to cause anticompetitive harm that the favored structure is not. There is no reason to systematically discourage firms from entering into joint ventures. Indeed, joint ventures are often preferable to mergers or acquisitions from an

antitrust point of view, since they may preserve a greater degree of competition between the participants.

The court of appeals' decision will have a negative impact on the oil and gas industry, where joint ventures play an important role. A federal agency recently concluded that joint ventures have allowed U.S. oil companies to share assets and operations, reduce costs, and use productive capacity more efficiently. Another recent federal government study found that significant multi-refinery scale economies can be achieved through joint ventures, particularly in gasoline production, and noted that it may not be possible to achieve these synergies absent joint ventures or mergers. The study concluded that other segments of the oil and gas industry, such as pipelines, also depend heavily on joint ventures. Recent developments have highlighted the need for continued investments by U.S. companies in oil and gas production and refining. The court of appeals' decision creates an unjustified obstacle to the use of flexible joint venture structures that are needed to ensure that such investments can be made in the most efficient manner.

ARGUMENT

The court of appeals applied the wrong legal analysis to an integrated joint venture created by the Petitioners to combine all of their downstream petroleum operations. Petitioner's creation combined two separate economic actors into a single, unified entity. Nevertheless, the court of appeals isolated one aspect of the new venture's operations — the decision to set a single price for both of the venture's gasoline brands — and analyzed it as if it were an agreement between competitors rather than a feature of the newly created entity. The court of appeals' analysis is inconsistent with this Court's precedents, and creates uncertainty as to the legal standard governing a range of existing and future joint ventures that are

essential to the efficient operation of the oil and gas industry.

I. The Per Se Rule Does Not Apply To Decisions With Respect To The Pricing Of Products Produced And Sold By An Integrated, Efficiency-Enhancing Joint Venture.

The court of appeals erred in holding that the per se rule may govern a decision to charge unified prices for products produced and marketed by an integrated joint venture such as Equilon.[6] As a general matter, joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 768 (1984). "Accordingly such combinations are judged under a rule of reason" rather than the per se rule. *Id.* Indeed, when the joint venture involves a "partnership[ ] or other joint arrangement[ ] in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit" it is "regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982).

To be sure, a purported joint venture may be subject to condemnation under the per se rule if it is a mere sham – that is, if it involves no actual, efficiency-enhancing integration of economic activity. *See Timken Roller*

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[6] The per se rule imposes "a conclusive presumption that the restraint [at issue] is unreasonable," and is limited to situations in which "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982). Under the rule of reason standard, "the factfinder weighs all of the circumstances" in deciding whether a challenged restraint is unreasonable. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988).

Bearing Co. v. United States, 341 U.S. 593, 597-98 (1951). But there is no suggestion that the Equilon joint venture was a sham. To the contrary, it is undisputed that Equilon was an integrated joint venture in which Petitioners pooled their assets, shared the risks of loss and opportunities for profit, and achieved hundreds of millions of dollars each year in efficiencies.

Equilon's integrated nature led federal and state antitrust enforcement officials to analyze its formation as a merger rather than a joint venture that involved ongoing competition between the participants.[7] The court of appeals failed to consider whether Equilon should be analyzed as a merger of Petitioners' downstream businesses. Instead, it erred by engaging in a form of antitrust analysis that is properly applied to conduct affecting competition outside of the joint venture.[8]

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[7] The federal antitrust enforcement agencies generally analyze a joint venture as a merger when: "(a) the participants are competitors in [the] relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently specific and limited period [generally 10 years] by its own specific and express terms." Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors § 1.3 (Apr. 2000) (hereafter "*Competitor Collaboration Guidelines*"). There is no dispute that the Equilon joint venture meets these requirements.

[8] The court of appeals' confusion is illustrated by its quotation from a law review article related to a proposed standard of review for "ancillary agreements that limit competition among [the joint venture partners]." *See* Thomas A. Pirano, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1188 (2001); Pet. App. 22a n.14. The article cited by the court of appeals recognizes that where, as in this case, "the parties contributed all of their (continued...)

The fact that the joint venture, like a merged entity, determines the prices for the products it produces and sells is not a basis for applying the per se rule of illegality. While it is certainly true, as a general rule, that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), this Court has recognized that not every practice that can be described as "price fixing" automatically qualifies for condemnation under the per se rule. In *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), the Court approved an arrangement under which a single price was established for a blanket license to thousands of copyrighted musical compositions. The Court explained that "[w]hen two partners set the price of their goods or services, they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* at 9.

This result would follow even if the participants in the joint venture were competitors. As a respected commentator has noted, "joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold. When joint owners are also competitors, the result is literally 'price fixing,' but it is a form of price fixing that should, when bona fide, be examined under the rule of reason." XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2132c, at 180 (2d ed. 2005). In this case, however, Petitioners ceased to be competitors in the relevant markets when they entered into the joint ventures, contributed their downstream assets in the United States to the joint ventures, and agreed to share

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existing production or marketing operations in the relevant market to the venture" the venture should be analyzed as a merger and that the ancillary agreement rule cited by the court of appeals would be inapplicable. *Id.* at 1168.

profits and losses in proportion to the value of the resources they contributed.

The prices of Equilon's products unquestionably were an integral part of its business of producing and marketing gasoline. *See* XI Hovenkamp, *supra*, ¶ 1908e, at 263-64 ("agreements about price are often essential to the administration of certain joint ventures, particularly in distribution"). The court of appeals thought it was significant that the products of the joint venture were sold under two brand names rather than one. Pet. App. 23a. But this fact does not alter the antitrust analysis. Whether sold under a single brand or two brands, the products were produced, marketed, and sold by Equilon. Petitioners were no longer competitors in seeking to maximize sales of Texaco-branded gasoline at the expense of Shell-branded gasoline, or vice versa, but instead were seeking to maximize the overall success of the joint venture in competition with other producers and sellers of gasoline.

The court of appeals also thought it was significant that the agreement provided for charging the same price for Shell and Texaco gasoline in a given geographic area, rather than different prices. Pet. App. 5a. Again, this aspect of the agreement does not change the antitrust analysis, let alone provide a basis for applying the per se rule. Having agreed to contribute all their downstream assets to Equilon and to share profits and losses in proportion to the value of the assets they contributed, Petitioners were no longer competitors. Decisions with respect to pricing the joint venture's products could not harm competition, because the joint venture eliminated competition between Petitioners.[9]

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[9] Equilon and Petitioners had an incentive to charge different prices for Shell and Texaco brands if by doing so they could increase the overall profitability of the joint venture. This lends (continued...)

II. The Court Of Appeals' Decision Is Likely To Harm Competition In The Oil Industry And Elsewhere.

The court of appeals' decision reflects unwarranted judicial hostility towards joint ventures that is likely to harm competition and consumers. This Court recently observed that "false condemnations" under the antitrust laws "are especially costly, because they will chill the very conduct the antitrust laws are designed to protect." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S.Ct. 872, 882 (2004). By extending the per se rule beyond its proper boundaries and subjecting integrated joint ventures to a risk of per se illegality, the court of appeals' decision will deter firms from participating in procompetitive joint ventures, including in particular joint ventures in the oil and gas industry.

The consequences of civil liability under the Sherman Act are severe, including treble damages and attorney's fees. Firms will be reluctant to place themselves in a situation in which private plaintiffs can seek treble damages under a per se theory without even attempting to show that the conduct at issue has anticompetitive consequences. Accordingly, if integrated joint ventures

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support to Petitioners' contention that the uniform price provision avoided possible price discrimination claims under the Robinson-Patman Act. The court of appeals dismissed this argument out of hand, Pet. App. 25a-27a, but it may have failed to consider that Robinson-Patman Act litigation is not an unusual occurrence in the oil industry, *see, e.g., Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990), and that Equilon would have incurred costs in reviewing price differences to ensure compliance with the Robinson-Patman Act and dealing with Robinson-Patman claims, even if such claims ultimately were determined to lack merit.

present a risk of per se illegality, firms will be far less willing to participate in them.

Firms regularly choose joint ventures over other possible business structures, such as mergers or acquisitions. In the absence of a valid basis for concluding that joint ventures pose greater threats to competition than mergers, antitrust law should not favor one business structure over another. *See* Howard H. Chang, David S. Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 262 (It is a "first principle" "that antitrust policy should not bias the selection of a form of business organization by entrepreneurs and investors."). Indeed, joint ventures often may be preferable to mergers from an antitrust point of view. As the Department of Justice and the FTC have explained, "[m]ost mergers completely end competition between the merging parties in the relevant market(s). By contrast, most competitor collaborations preserve some form of competition among the participants." *Competitor Collaboration Guidelines* at § 1.3. In addition, "[m]ergers are designed to be permanent, while competitor collaborations are more typically of limited duration." *Id.*

The court of appeals' decision will discourage potential participants from forming integrated joint ventures that involve an agreement as to the price of the venture's output. Because "agreements about price are often essential to the administration of certain joint ventures," XI Hovenkamp, *supra*, ¶ 1908e, at 263-64, this will prevent many beneficial joint ventures from getting off the ground. Moreover, the logic of the court of appeals' decision may threaten other procompetitive joint ventures as well. The rule of per se illegality has been applied not only to naked price-fixing agreements, but also to other types of horizontal agreements that are not part of an efficiency-enhancing integration of economic activity.

Thus, for example, naked agreements determining output, *Hartford-Empire Co. v. United States*, 323 U.S. 386, 406-07 (1945); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389-90 (1923), or fixing the amount of a basic input, *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 424 (7th Cir. 1965), have been held to be per se illegal. On the basis of such decisions, the court of appeals' reasoning could be extended to call into question a wide range of joint venture agreements. For example, under the rationale of the court of appeals' decision, a production joint venture could be challenged as a per se violation of the antitrust laws on the ground that it involved an agreement fixing the amount of production or the amount of an input to the production process.

The chilling effect of the court of appeals' decision will apply with particular force to joint ventures in the oil and gas industry. A recent report by a U.S. government agency concluded that joint ventures provide U.S. oil companies "with a way of reducing their costs by sharing assets and operations without some of the problems of a full-scale merger of the two companies involved." Energy Information Administration, *The U.S. Petroleum Refining and Gasoline Marketing Industry* (updated August 19, 2004) (available at www.eia.doe.gov/emeu/finance/usi&to/downstream/index.html. The EIA Report describes recent examples of joint ventures in gasoline refining and marketing including, in addition to the Equilon and Motiva joint ventures, a Marathon Ashland joint venture involving downstream operations that "is anticipated to result in savings of $200 million annually in operating costs" and joint ventures "involving a single refinery with each partner having a 50-percent share of the venture." *Id.* The EIA Report notes that these joint ventures "are aimed at reducing costs either through reducing or eliminating redundancies, reducing logistical costs, or reducing unused capacity." *Id.*

Similarly, a recent FTC report concludes that there are "[s]ignificant multi-plant scale economies in refining" that can be achieved through joint ventures. FTC, Bureau of Economics, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* 180 (2004) (hereafter "FTC Staff Study"). The FTC Staff Study concludes that "[t]echnical constraints that otherwise would be binding if refineries were run in isolation can be relaxed if a firm operates in multiple sites as a single refinery." *Id.* The FTC Staff Study identifies four specific sources of efficiencies: "First, there may be volume-related purchase or transport benefits in obtaining crude oil for multiple refineries. Second, a refiner may be able to exchange intermediate feedstocks among nearby refineries to utilize each of the refineries' various units more fully and to produce the highest value finished products. Third, a refiner may be able to blend the outputs from each of the refineries to increase the amount of higher value finished products, such as gasoline or diesel fuel, that the refineries can produce. Finally, multi-refinery operation may permit capital savings when process upgrades are made. For example, when a refiner considers adding new downstream processing units, it may be more efficient to add one large unit at one refinery and ship intermediate feedstock from a second refinery rather than build separate smaller units at the two refineries." *Id.* at 180-81.[10]

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[10] In some situations it may be possible to achieve multi-refinery synergies through purchase and sale agreements, joint input purchasing arrangements, or product exchanges. But as the FTC Staff Study notes, "transaction costs considerations in some instances require a merger or joint venture to achieve these synergies or to realize them more fully." FTC Staff Study 181 n. 23. For example, firms may find it difficult to value feedstocks that are "lightly traded" and "do not have a widely acknowledged market price." *Id.* Contractual approaches may (continued...)

Gasoline production, in particular, presents opportunities to achieve significant efficiencies through multi-refinery operations. As the FTC Staff Study explains, "[f]inished gasoline is a complex blend of various intermediate refinery streams that must meet finished gasoline specifications, such as sulphur content, Reid Vapor Pressure, and octane. Different refineries may have different constraints on specifications of gasoline that can be produced. For example, it may be possible to increase the total amount of gasoline produced, or to produce it at lower cost, by blending higher octane, higher sulphur gasoline from one refinery with lower octane, lower sulphur gasoline from another refinery." The FTC Staff Study concludes that "[t]he advantages of multi-refinery operation probably have become more important since the mid-1980s because of the larger number of environmental mandates for gasoline specifications." *Id.* at 181.

Other segments of the oil and gas industry, in addition to refining, rely heavily on joint ventures. For example, "[j]oint ventures are a common ownership structure for pipelines because of the economies of scale and high capital costs of pipelines." FTC Staff Study at 161. Oil and gas producers regularly form joint ventures at every level of the petroleum supply chain to share the enormous risk and expense of exploring for and producing oil. "Capital needs in refining compete with capital needs

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also be unsuitable "when parties are unable to specify contractual contingencies sufficiently, perhaps because the likelihood of different future outcomes is too difficult to predict or agree upon." *Id.* These problems are "magnified when firms must make significant sunk investments that are specific to the proposed exchange." *Id.* If potential participants in a joint venture face a risk of per se antitrust liability, it may become impossible to achieve multi-refinery synergies through a joint venture.

in other petroleum segments as well as capital needs of other industries. . . . While no two industry participants are likely to access capital funding in exactly the same way, no participant has unlimited access to resources." National Petroleum Council, *Observations on Petroleum Product Supply* I-17 (2004). Forming joint ventures to develop a particular project may provide access to sufficient capital that a single company alone could not provide.

The form that the collaboration takes – a merger, a fully-integrated joint venture, or a more limited collaboration – should be based on actual business and economic factors, not on the use of pejorative labels like "price fixing scheme." Pet. App. 28a. *Cf. Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n. 21 (1977) ("an antitrust policy divorced from market considerations would lack any objective benchmarks."). Requiring owners of a joint venture to justify a perceived restraint on competition between them that no longer exists lacks any basis in economic reality and unsettles the legal standards governing integrated joint ventures.

In sum, the availability of a flexible joint venture framework is beneficial to competition and consumers. The benefits are particularly significant in undertaking risky and capital-intensive projects and in coordinating complex productive assets such as refineries. Recent disruptions in gasoline refining and transportation resulting from Hurricane Katrina underscore the need for continued investments in gasoline production and refining. The unduly restrictive and punitive antitrust regime adopted by the court of appeals would hinder companies from developing and implementing flexible business structures that are best suited to making these investments and competing in a global industry.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 2005

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